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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,

Petitioner,

v.

RICHARD N. McCARTY,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION
and
AMERICAN CIVIL LIBERTIES UNION OF OHIO

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Interest of Amici Curiae

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving the liberties guaranteed in the Bill of Rights. The ACLU of Ohio is one of its state affiliates.

The ACLU has frequently appeared before this and other courts to defend the procedural rights this Court has recognized to give life to Fifth and Sixth Amendment guarantees. We appear amici curiae here, with the consent of the parties* because the arguments submitted here by petitioner severely threaten to erode those rights.

*Letters of consent are being lodged with the Clerk directly by the parties.

SUMMARY OF ARGUMENT

The requirement for Miranda warnings is controlled by the custodial nature of the interrogation rather than the nature of the offense charged.

ARGUMENT

WHETHER MIRANDA WARNINGS WERE IN ORDER CORRECTLY TURNED ON THE CUSTODIAL NATURE OF THE INTERROGATION AND NOT ON THE NATURE OF THE OFFENSE IT PROBED

Almost two decades ago this Court expressed its concern that the due process voluntariness criterion, when applied to "incommunicado interrogation of individuals in a police-dominated atmosphere" too often is handicapped by vague, elusive and therefore indefinitive "totality of circumstances" considerations.[1] Responding to this concern, in Miranda v. Arizona, 384 U.S. 436 (1966), it formulated a per se alternative of "procedural safeguards" to

1/ For critical analyses bearing on this subject, see Kamisar, Police Interrogation and Confessions, Essays in Law and Policy (U. of Mich. Press, 1980).

protect the privilege against self-incrimination during "custodial interrogation". Since then, absent the prescribed admonitions conerning the right to silence, the right to counsel and the consequences of a waiver, statements elicited from an accused cannot be used at trial.

Nowhere does Miranda suggest that the requirement for such warnings is to hinge upon the nature of the charge. Unmistakably its focus is on the fact that the interrogation has taken place in a custodial setting, in the present case the stationhouse to which the arrestee was brought. Thus, explicitly encompassed is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." Id. at 477; see, also, Orozco v. Texas, 394 U.S. 324, 327 (1969); Mathis v. United States, 391 U.S.1 (1968); cf. Oregon v. Mathiason, 429 U.S. 492 (1977).

Nonetheless, petitioner today urges the Court to carve out an exception to this easily understood

"bright-line" rule. In particular, it would not have the Court enforce Miranda where a traffic violation, albeit here one carrying a mandatory term of imprisonment (Ohio Rev. Code §§4511.19 [1982], 4511.99 [A] [1982]), is the cause of the custody. But, while it cannot be gainsaid that a small minority of lower courts have so ruled (see Respondent's Brief, pp. 18-20), the relevant decisions of this Court, as the Massachusetts Supreme Judicial Court recently observed, do not support such a distinction. Commonwealth v. Brennan, 386 Mass. 772, 438 NE2d 60, 63 (1982); see, also, Lewin v. New Jersey, 444 U.S. 905, 906 (1979) (White, J., dissenting from denial of certiorari); Police Interrogation - - Traffic Offense, Ann. 25 A.L.R.3d 1076 (collecting cases); see, generally, L. Herman, The Right to Counsel in Misdemeanor Court 8 (1973).

In any event, the heart of petitioner's thesis that traffic stops are too commonplace to allow for invocation of Miranda's protective ambit does not stand up, precedentially or logically:

Thus, in Delaware v. Prouse, 440 U.S. 648

(1979), the Court considered, and emphatically rejected, the notion that motorists somehow are stripped of constitutional rights on account of that status alone. Granting the interest claimed by petitioner here, i.e., a State's "vital interest" in safe highways, Delaware declared that, absent random systematic spot checks or an articulable basis, "stopping an automobile and detaining the driver in order to check his driver's license and registration of the automobile are unreasonable under the Fourth Amendment."

No more convincing, we suggest, is petitioner's blurring of the legal and practical distinction between a routine on-the-scene inquiry of a motorist stopped for a traffic infraction and an occasion on which the allegedly erring motorist is compelled to accompany the police for questioning. In the latter event, the motorist necessarily faces the coercive stress that not uncommonly inheres in the combination of a forced loss of freedom, its deprivation at the hands of those whose very badges, guns and uniforms are calculated

to create control and induce submission and, finally, as here, removal to the unfamiliar, if not completely private, surroundings inhabited by the police.

And all the more may this be so with a motorist for whom, since she or he will rarely be a case-hardened criminal, this nearly always will be a first experience with custodial interrogation. As like as not, such an individual is bound to be too passive to appreciate and exercise his or her constitutional rights. See, Project, Interrogations in New Haven: The Impact of Miranda, 76 Yale LJ 1519, 1554 (1967). It is significant then, as Respondent's Brief so well indicates, that the influence of Miranda has proved both workable and salutary.

In sum, the history and spirit of Miranda and the experiential facts which gave it life make clear the requirement that whether its warnings must be employed is not to be determined by the nature of the offense but by the nature of the interrogation. Clay v.

Riddle, 541 F.2d 456, 459 (4th Cir. 1976) (Butzner, J., dissenting).[2]

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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2/ In like vein, model codes now require the administration of warnings "as promptly as reasonable under the circumstances * * * [when] a detained or arrested person * * * is to be removed from the scene." Uniform Rules of Criminal Procedure, Rule 212(b); see, also, ALI Model Code of Pre-Arraignment Procedure, §120.8 (Official Draft #1, 1972). The test is clear and easily understood. There is no reason to jettison it.